MISCELLANY.

Competency of Witness with High Blood Pressure.—In the case of Stephens *v.* State, 86 Southern Reporter, 111, which was an appeal from a conviction of manslaughter in the first degree, the Alabama Court of Appeals held that there was no error in the court's action in permitting the state to examine as a witness one who was suffering from high blood pressure. Judge Samford, who wrote the opinion, stated that it was for the court to determine the competency vel non of the witness, and the fact that he was dizzy would not render him incompetent. The judgment was reversed on other grounds.

Tinkering with the Law.—In the last issue of the LAW REGISTER editorial reference was made to tinkering with rules of practice. In a recent case the Supreme Court of North Carolina discusses another phase of tinkering. In Capps *v.* A. C. L. R. Co., 108 S. E. 300 (Sept. 14, 1921), which was an appeal from an order refusing to dismiss an action, the Court dismissed the appeal with these remarks, the mild sarcasm of which is obvious:

"It is useless to cite cases, for they are very numerous and without exception. As this court has said (as to another point):

" 'There are some matters at least, which should be deemed settled and this is one of them.' Burrell *v.* Hughes, 120 N. C. 279, 26 S. E. 782."

Negligence of Payee as a Defense to Bank Paying Check on Forged Endorsement.—It seems obvious that in the ordinary action upon contract for failure to deliver goods, it would be no defense, in the absence of estoppel, that the plaintiff knew the goods had been stolen and had failed to give notice of the theft[1] to the defendant within a reasonable time. Likewise if a thief steals the plaintiff's chattels and sells them to an innocent purchaser, in an action by the plaintiff for the conversion, it would be no defense to aver that after discovering the theft, the plaintiff did not give notice thereof to the purchaser within a reasonable time.[2] But in the analogous situation which was presented in the recent case of Annett *v.* Chase National Bank (1st Dept. 1921), 196 App. Div. 632, 188 N. Y. Supp. 7, a different rule was said to apply. In that case, the plaintiff was the payee of a draft on the defendant bank. The plaintiff's attorney forged the indorsement and upon this forged indorsement, the bank paid the draft. The

[1] While there may be a duty to inform the proper public officer of the commission of a felony, this duty would give rise to no civil rights in the victim of the felony.

[2] But no recovery in conversion may be had against an innocent purchaser in New York until demand and refusal. Tompkins *v.* Fonda Glove Co. (1907), 188 N. Y. 261, 80 N. E. 933 (*semble*).

attorney converted the proceeds to his own use. The plaintiff, having learned of the forgery, delayed two months before notifying the defendant bank thereof. This was an action for the conversion of the draft. Judgment on a verdict for the plaintiff was reversed on appeal, on the ground that the failure to give notice was negligence as a matter of law which barred the plaintiff from recovering, although there was no proof that such delay had actually caused any loss to the defendant.[3]

Leather Manufacturers' Bank *v.* Morgan[4] was the leading case cited in support of this doctrine. That was an action by a depositor to recover sums paid out on raised checks. The plaintiff had received bank statements and failed to examine them. The court held that custom and usage in the banking business had imposed upon a depositor the duty of diligently examining bank statements;[5] that the silence of the depositor was equivalent to a representation that the statements were correct;[6] that if the bank in reliance upon this representation failed to take steps against the criminal, the depositor was thereby estopped from setting up that the statements were incorrect.[7] And the court qualified this by stating[8] what seems to be the law in New York and generally, that if the bank was negligent[9]

[3] Of course, if the owner was not negligent, a bank is liable for money paid on a forged instrument whether it was negligent, Louisville, etc., Ry. *v.* Citizens,' etc., Bank (1917), 74 Fla. 385, 77 So. 104 or not. 'Robinson *v.* Chemical Nat'l. Bank (1881), 86 N. Y. 404.

[4] (1886) 117 U. S. 96, 6 Sup. Ct. 657.

[5] See National Dredging Co. *v.* Farmers' Bank (Del. 1908), 6 Penn 580, 589, 69 Atl. 607; Bank *v.* Richmond El. Co. (1907), 106 Va. 347 350, 56 S. E. 152. But the depositor is under no duty to verify indorsements. Los Angeles Investment Co. *v.* Home Sav. Bank (1919) 180 Cal. 601, 182 Pac. 293; Metallurgical Securities Co. *v.* Mechanics, etc., Nat'l. Bank (1916), 171 App. Div. 321, 157 N. Y. Supp. 321. And the depositor is under no duty to call for a pass book left by him to be balanced. McCarty *v.* First Nat'l. Bank, etc. (1920), 204 Ala. 424, 85 So. 754.

[6] See National Dredging Co. *v.* Farmers' Bank, *supra*, footnote 5, p. 589.

[7] Some cases, including those in the federal courts, have announced the rule that the negligence of a depositor is not a defense unless it amounts to an estoppel or is the proximate cause of the forgeries. United States *v.* National Bank of Commerce, etc. (C. C. A. 1913), 205 Fed. 433; New York, etc., Bank *v.* Houston (C. C. A. 1909), 169 Fed. 785; Jordan Marsh Co. *v.* National Shawmut Bank (1909), 201 Mass. 397, 87 N. E. 740. This is the rule which would be expected by analogy to the cases not involving banks. Also *cf.* Hammerschlag Mfg. Co. *v.* Importers,' etc., Bank (C. C. A. 1919), 262 Fed. 266, where the plaintiff depositor was held bound by the bank's stipulations limiting liability for forgeries not reported within a specified time after the return of vouchers. But see cases *infra*, footnotes 12, 13 and 14.

[8] Leather Manufacturers' Bank *v.* Morgan, *supra*, footnote 4, p. 112.

[9] A bank is under a duty not to pay without identification of the

in failing to detect the alterations, the negligence of the depositor would be immaterial.[10] There is a vital difference, however, between this case and the instant case. In the instant case, the plaintiff was a stranger to the bank. He never made any representation to the bank. His liability here, if any, would seem to rest upon a different principle. Yet the courts fail to recognize this. They treat the cases precisely the same. Granting the correctness of this, however, yet the instant case neglected to consider the question whether or not the bank was negligent, apparently assuming it to be immaterial.[11]

In the depositor cases, if the plaintiff's negligence contributed to the bank's deception, then if the bank used due care, there can be no recovery against it.[12] The New York courts follow this rule by holding that negligent failure to detect and give notice is a defense as to forgeries perpetrated subsequent to the plaintiff's default in inspecting prior statements evidencing forgery.[13] But here they stop, in contrast to Leather *v.* Manufacturers' Bank *v.* Morgan, and allow a recovery as to forgeries perpetrated prior to the first moment when, through failure to examine his statements, the plaintiff became negligent.[14] If this be the rule with regard to a depositor who is in so close a business relationship with the bank, much more so, seemingly, would it be the rule as to comparative strangers like the payee in the instant case from whom a duty of detection or disclosure would less justly be exacted. In this respect also then, the instant case seems at variance with previous New York decisions, for the

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payee or indorsee. Citizens' Nat'l. Bank *v.* Reynolds (Ind. 1920), 126 N. E. 234; Jordan Marsh Co. *v.* National Shawmut Bank, *supra*, footnote 7. But a liability incurred by a breach of this duty may be extinguished if the depositor was negligent and the bank used due care. Leather Manufacturers' Bank *v.* Morgan, *supra*, footnote 4.

[10] First Nat'l. Bank *v.* Farrell (C. C. A. 1921), 272 Fed. 371; National Dredging Co. *v.* Farmers' Bank, *supra*, footnote 5; Critten *v.* Chemical Nat'l. Bank (1902), 171 N. Y. 219, 63 N. E. 969; New York, etc., Bank *v.* Houston, *supra*, footnote 7; see Bank *v.* Richmond El. Co., *supra*, footnote 5; Brixen *v.* Deseret Nat'l. Bank (1888). 5 Utah 504, 513, 18 Pac. 43.

[11] This was plainly erroneous by analogy to the depositor cases. *Supra*, footnotes 7 and 9. However a bank may escape liability by establishing that it was not negligent but that the depositor was. Prudential Ins. Co. *v.* National Bank of Commerce (1920), 227 N. Y. 510, 125 N. E. 824.

[12] Weisberger Co. *v.* Savings Bank (1911), 84 Ohio St. 21, 95 N. E. 379; First Nat'l. Bank, etc. *v.* Walling & Son (Tex. Civ. App. 1920), 218 S. W. 1080.

[13] Critten *v.* Chemical Nat'l. Bank, *supra*, footnote 10; Morgan *v.* United States Mortgage, etc., Co. (1913), 208 N. Y. 218, 101 N. E. 871.

[14] Critten *v.* Chemical Nat'l. Bank, *supra*, footnote 10. The same distinction was made in National Dredging Co. *v.* Farmers' Bank, *supra*, footnote 5; *contra*, Leather Manufacturers' Bank *v.* Morgan, *supra*, footnote 4.

plaintiff here was in no way negligent until after the bank had paid the forged draft.[15]

The reasoning of the Pennsylvania courts inclines toward supporting the instant case.[16] Its justification is there found in the fact that delay may deprive the bank of an opportunity to go against the forger and may allow a dishonest depositor or payee to aid the forger to escape.[17] A similar argument, however, would have equal force in the case already mentioned where an innocent purchaser of a stolen chattel is sued in conversion. Yet the rule which would be followed, it is submitted, would be quite the contrary of that here laid down.

Whatever in such cases be the theory of the courts in placing a liability upon the plaintiff to have his claim against the bank defeated by his subsequent negligence, the weight of authority in the United States including New York allows no such result without proof of damage to the bank.[18] Yet slight proof of injury is often sufficient.[19]

The instant case goes further than the depositor cases, for here no representation was made upon which the bank would be justified in acting. This extension of settled legal principles cannot be justified upon analogy, but if at all, only upon the ground of the

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[15] N. I. L. (N. Y. Cons. Laws 1909), § 326, provides that no bank shall be liable for cashing forged checks unless the depositor gives notice of the forgery within one year after the return of the vouchers to him. But that statute does not apply to the situation in the instant case.

[16] Marks *v.* Anchor Savings Bank (1916), 252 Pa. St. 304, 97 Atl. 399 (payee of certified check); Connors *v.* The Old Forge Bank (1914), 245 Pa. St. 97, 91 Atl. 210; McNeeley *v.* Bank of North America (1908), 221 Pa. St. 588, 70 Atl. 891. The last two cases, both depositor cases, were relied upon in the instant case, together with Leather Manufacturers' Bank *v.* Morgan, *supra*, footnote 4, and United States *v.* National Exchange Bank (D. C. 1891), 45 Fed. 163. In this case "there was little consideration of the case of delay without resulting damage * * *" United States *v.* National Exchange Bank of Boston (D. C. 1905), 141 Fed. 209, 211. No other authorities were cited in the instant case. Even in Pennsylvania, however, no case has been found which justifies the extreme position of the instant case.

[17] See McNeely *v.* Bank of North America, *supra*, footnote 15, pp. 594, 595.

[18] Houseman Spitzley Corp. *v.* American State Bank (1919), 205 Mich. 268, 171 N. W. 543; Kearny *v.* Metropolitan Trust Co. (1905), 110 App. Div. 236, 97 N. Y. Supp. 274, aff'd (1906), 186 N. Y. 611, 79 N. E. 118; Murphy *v.* Metropolitan Nat'l. Bank (1906), 191 Mass. 159, 77 N. E. 693; Janin *v.* London, etc., Bank (1891), 92 Cal. 14, 27 Pac. 1100; Wind *v.* Fifth Nat'l. Bank (1890), 39 Mo. App. 72; Pratt *v.* Union Nat'l Bank (1909), 79 N. J. L. 117, 75 Atl. 313, *aff'd* (1911), 81 N. J. L. 588, 80 Atl. 492; Hardy & Bros. *v.* Chesapeake Bank (1879), 51 Md. 562; *cf.* First Nat'l Bank, etc. *v.* Allen (1893), 100 Ala. 476, 14 So. 335; but *cf.* Israel *v.* State Nat'l Bank, etc. (1909), 124 La. 885, 50 So. 783.

[19] *Cf.* Leather Manufacturers' Bank *v.* Morgan, *supra*, footnote 4.

present day commercial needs for expeditious banking methods.[20] Furthermore, the instant case by analogy seems at variance with three settled rules as laid down in previous New York cases. First, if the bank is negligent the negligence of the depositor is immaterial.[21] Second, if the bank suffered no loss the negligence of the depositor is immaterial.[22] Third, in any event the bank is liable to a depositor for paying forged instruments when at the time the payments were made, the depositor had violated no duty which it owed to the bank.[23] —*Columbia Law Review.*

Convicts Use Locomotive in Attempt to Escape.—Jack Foster, who was a prisoner in the California state prison at Folsom, was convicted of attempting to make his escape, and the judgment was affirmed by the California District Court of Appeal for the Third District in People *v.* Foster, 192 Pacific Reporter, 142. He and two other convicts boarded a locomotive, which was used in hauling freight cars from the prison to Folsom, where the road connected with the Southern Pacific Line, and entered the cab, where they held a knife against the body of the guard in charge, and in a threatening manner told him they were going to take a little ride, and ordered him to "open up" the engine and start it towards the gate. The guard started the engine, and on telling the convicts that it could go no further than the gate, because it was locked, he was told to "go on anyway." The gate was struck and broken down, and the engine passed through it, continuing for about four car lengths before being stopped. Prison guards then halted the prisoners and put them under confinement. Judge Hart wrote the opinion, wherein it was held that the evidence was sufficient to sustain the conviction.

The Sword of Justice.—In McMillan *v.* Osterson, 183 N. W. 487, the court said:

"The sword of Justice is not often made more keen by the whetstone of technicality, and a right secured by too rigid means may harden into a wrong."

Remedy for Sexual Weakness Kept from Mails.—A company operated by an individual engaged in selling an alleged remedy for sexual weakness and disorders in men, consisting of dried and powered sheep's testicles made into tablet form, which was sold, advertised, and remitted for through the mails, was prohibited from using the

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[20] Whether or not the facts in the instant case warranted a finding of ratification is another question. This note has attempted only a discussion of the ground taken by the court.

[21] Critten *v.* Chemical Nat'l Bank, *supra*, footnote 10.

[22] Kearney *v.* Metropolitan Trust Co., *supra*, footnote 17; Metallurgical Securities Co. *v.* M. & M. Securities Co., *supra*, footnote 5.

[23] Critten *v.* Chemical Nat'l Bank, *supra*, footnote 10.

mails by the issuance of a fraud order by the Postmaster General. He then changed the name of his company and its product, and, after making some changes in his advertising matter, he again used the mail to transact business. A supplemental fraud order was then issued against the use of the mails by the new company. His bill to restrain the postal authorities from acting pursuant to the fraud orders was dismissed in the District Court, and the decree was affirmed by the United States Circuit Court of Appeals, Seventh Circuit, in Leach *v.* Carlisle, 267 Federal Reporter, 61.

The opinion, which was written by Judge Aischuler, shows the methods adopted by the sellers of such remedies to dispose of their goods. However meritorious the remedy may have been, the court held that the fraud order was justified because the advertising employed made extravagant and unfounded claims. In dismissing the case it was said:

"That modesty or prudery, or whatever else it may be called, which puts a ban on frank and unrestricted reference to human sexual parts, and enfolds their mention and consideration in secrecy and shame, has given quacks and charlatans a most fruitful field for operation, of which they have not been slow to take advantage. Sometimes boldly, but often by suggestion and innuendo, they undertake to make all men believe they have symptoms of most serious sexual disorders, when, in truth, they are more often perfectly normal, and that the natural subsidence of virility (which is generally quite as certain as the flight of years) will be arrested, and the victim restored to the vigor of robust youth, and that all sexual troubles will be corrected, if only that particular nostrum be taken, or that plan persistently followed. He who would operate in this peculiar field of endeavor must have a special care that his scheme is not calculated to instill in men unfounded fears, or inspire in them false hopes, as a means to the end of obtaining their money."

Women as Jurors.—As a sex women are ready and willing to serve their country and their fellow citizens by taking their places in the jury box. British authors may rail at the indecency and unpleasantness to which they may be subjected in the trial of certain cases, but few women will flinch if civic duty calls.

One or two of those interviewed for the purpose of learning the consensus do cling to the old fashioned anti-suffragist notions about women holding themselves aloof from and closing their ears to the details of life's many tragedies as told on the witness stand. But their number is few. The others, who are in the great majority, advance the opinion that a mixed gathering in a jury box would become a factor in the destruction of the double standard of morals. Limit the jury women, for the present, to married women, suggests another. It would make it less embarrassing in the case of a

divorce trial. Still another feminine voter pooh-poohs this suggestion and advocates calling only mature women to jury service.

Almost every woman questioned on the subject, which has aroused such feeling in England, where six women sat with six men in the jury box during the hearing of a divorce case where the counsel for one side declared he had had to suppress a part of the evidence because of the presence of the women, expressed herself as willing to serve whenever called upon. These women, representing the various political parties and club activities, point with pride to the State of New Jersey, which has already called its recently enfranchised for hearing of both civil and criminal actions.

Men whose opinions were asked, including Justices of the Supreme Court, magistrates and prominent lawyers, differed in their views as to the advisability of women serving on juries in criminal cases.

In a bigamy case tried recently in England the defendant objected to having four women on the jury and his objection was upheld. In replacing the women jurors by men the Judge said the objection to women and his action in upholding it should not be taken as a slight to the sex.

Annette Abbot Adams, first woman to hold the important position of Assistant Attorney-General of the United States, believes that sex has no place in the court room. It is her opinion that since the extension of the suffrage to women has placed them on an equal footing politically with men there is no reason why there should not be mixed juries of men and women, regardless of whether the cases be murder, divorce or others involving more serious moral and sex questions. Mrs. Adams believes that, since we live in a mixed world of men and women, the only way to get a really representative jury is to mix it.

"Not that the mixing should be compulsory," said Mrs. Adams. "It would be inadvisable to have any regulations at all as to how many men or how many women there shall be on any jury. That would emphasize again the thing that I have steadfastly opposed, privately and publicly—sex in citizenship. The number of men or women on any specific jury should be left to work itself out subject to the usual weeding by challenges, peremptory or otherwise. There is no more necessity for stipulating the proportion of men and women than the proportion of professional men to day laborers, or native born to naturalized."

Nor does Mrs. Adams believe in special exemptions or privileges for women talesmen. She successfully opposed the incorporation of any such in the amendment to the California Constitution which was necessary in order to make women eligible to jury duty. Nor would she grant the validity of any practical objections to mixed juries in cases which required locking up the jury over night.

Hon. Florence E. Allen Judge of Court of Common Pleas of Cleveland, Ohio says:

I believe that in practically every kind of case tried by a jury, civil and criminal, women may serve together with men as jurors, to the furtherance of substantial justice. One great hindrance to the proper conduct of the ordinary trial is the difficulty of securing intelligent jurors. Having women serve upon the jury more than doubles the number of intelligent citizens available for jury service. This is true because, with the exception of the women with young children, women of education and intelligence have more leisure, relatively, than men of equal education and intelligence. We therefore should use women for jury service unless some obvious disadvantage arises from their use. In my experience, which has been confined wholly to criminal courts, no disadvantages have arisen from the use of women on mixed juries. I know of no instance in which the women have failed to co-operate with the men upon the juries. We do not, in Ohio, try divorce cases to a jury, but I have had women in cases involving robbery, burglarly and murder. They are extremely attentive and follow the evidence with conscientious interest. The men jurors have commented favorably upon their work, and in general the women who have served upon my mixed juries have given excellent satisfaction.

Justice Daniel F. Cohalan of the Supreme Court of New York County took the position that the sense of chivalry which is shown toward women would prevent their being compelled to belong to juries before which salacious divorce cases are being discussed.

"Inasmuch," he continued, "as in New York State there is only one ground for divorce—that of infidelity—every divorce case must have what may be interpreted as an element of salaciousness. On that account a woman might well ask to be excused from serving on such a jury on the ground of sex."

These are cases, in the opinion of the Justice, however, in which women could serve as jurors with men without being placed in any embarrassment.

Frederic R. Coudert, a distinguished member of the Bar of New York, who has also had a wide experience abroad, said that women as they came into all the responsibilities of citizenship could hardly expect to escape jury duty. Whether or not they served with those of their own sex or with men jurors seemed to him immaterial. Their presence in divorce cases would be expected, in that often in such cases women appeared as parties to the action or as giving testimony.

"Domestic infidelity exists," he continued, "and it is bound to come to the notice of the tribunals. Why, then, should not women of proper age and high intelligence, who have so intimate a knowledge of those matters which affect the home, be called upon to pass upon such matters?

"It is a false standard and one of prudery which we have inherited from another state of society which dictates any other course. The indecency lies rather in the attempted concealment, in the disguising of facts of elementary social life rather than in their frank discussion, especially when necessary to effect justice and to bring about a better state of affairs."

Mrs. Jeanette G. Brill, president of the Brooklyn, New York Women's Bar Association, has publicly expressed herself on the subject of women jurors. She points out some of the objections advanced to women being called upon for such service saying the opposition is found almost entirely in the country. The legislators from country districts say they are opposed because it would be difficult for the farmers' wives to leave home and travel perhaps a long distance to the county seat for jury service. These legislators are suggesting that a bill to remove the restriction in this State against women jurors should be so worded as to make it a permissive measure.

Mrs. Brill advances the argument in favor of jury service by women that it would prove vastly educational. "In the first place," says Mrs. Brill, "jury service would broaden their legal knowledge, and this would be helpful in their everyday dealings with tradesmen, landlords and others. Mothers with court experience would learn to be far more careful of their young daughters. Having had examples before their own eyes they would realize better some of the dangers that beset the path of the young girl."

Judge Otto A. Rosalsky of the Court of General Sessions, New York City is heartily in favor of enlisting the services of women as jurors in criminal cases. Equally opposed to the plan is Judge Alfred J. Talley of the same court. Judge Talley, it may be stated, has had but little experience as a Judge, although he has been a practising attorney for many years. Judge Rosalsky has had fifteen years experience on the bench and he has drawn his conclusions from practical experience. It was Judge Rosalsky who first assigned women to defend women accused of crime. He says he finds the service equally as good as that rendered by the male lawyer. He feels that a woman gets at the heart of a woman quicker than a man, conditions being equal. He is of the opinion that a mixed jury of men and women could handle any class of criminal business hat might be presented to it.

Arthur C. Train of the New York bar has long studied criminal juries at close range, although he is still young in years. As Assistant District Attorney, as the creator of "Tutt and Mr. Tutt," who as a legal team carried juries where they would, he is an expert on jurors of all kinds. In a letter to the editor he tells of "Twelve Good Women and True." As he sets forth there, women have been serving on

juries for about a half century in this country, for way out in Laramie, Wyo., they were held to be eligible for that duty.

"It is a matter of common sense," said Mr. Train, "that women who are voters, as all of them are now who are citizens, should expect to be jurors. As jurors they would be expected to sit in all kinds of cases. There is no reason whatsoever for their declining to serve in cases in which there are details which may offend the delicate sensibilities of persons of refinement. As a matter of fact, many of these details are printed in the newspapers and the average woman is fully aware of what is going on in the community. Such knowledge is not limited to men—women and children know about it also.

"It is no pleasure for any one to listen to such prurient details. But if men are to be bored by having to hear them—for such testimony is boresome—women should not be exempt."—*Lawyer and Banker.*

Validity of City Charter Providing for Proportional Representation.—The provisions of the city charter of Kalamazoo, Mich., which adopted the Hare system of voting to secure proportional representation, were declared invalid by the Supreme Court of Michigan in Wattles *v.* Upjohn, 170 Northwestern Reporter, 335. The idea of the system is to have representation in governmental affairs in proportion to numerical strength of parties or constituencies, so that the minority parties may, by grouping their votes, have representation as well as majorities. Judge Steere, in a very interesting manner, reviews the different methods by which the same result was to be attained. In discussing the adoption of proportional representation by the "newer democracies" in Europe he says:

"Adoption of proportional representation by those and other war-disturbed countries but recently liberated, for self-determination and adoption of a government by and for their people, perhaps throws little light thus far upon the subject, in theory or practice, beyond showing that it does not in practice always operate for the healing of nations as basically and promptly as many of its propagandists have prophesied, and that those countries least experienced in systems of government with the sovereign power vested in the people adopt that political policy with greater avidity than older nations of long experience, which have made that form of government fairly successful and stable. In that connection there is ground for saying that the slow progress of this attractive theory for political reform here, and elsewhere in older and more stablized representative governments, can be attributed in part, at least, to misgivings, even by many recognizing the merits of the theory, as to a feasible method for its practical application which will correctly, and true to the theory, work out the beneficent results indicated."